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IDAMAN PELITA SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[CIVIL APPEAL NO: R1-14-12-10-2013]
B 17 MAY 2016

REVENUE LAW: *Income tax – Case stated – Application to require Special Commissioners of Income Tax ('SCIT') to find further facts and to state supplementary case – Whether SCIT broadly covered area to be dealt with –*
C *Whether court could exercise discretion – Income Tax Act 1967, Sch. 5 para. 40(b)*

REVENUE LAW: *Income tax – Special Commissioners of Income Tax ('SCIT') – Production of notes of evidence of appeal to SCIT – Whether High Court can only hear appeal on question of law by way of case stated – Order to produce notes of evidence not expressly prayed for – Whether High Court has discretionary power to*
D *order production of notes of evidence – Whether order wholly exceptional and sui generis – Income Tax Act 1967, s. 102(4), Sch. 5 paras. 34 & 39(c)*

STATUTORY INTERPRETATION: *Canon of construction – Generalia specialibus non derogant – Whether specific statutory provision should override*
E *general statutory provision – Income Tax Act 1967, Sch. 5 para. 41 – Courts of Judicature Act 1964, s. 67(1)*

In this appeal, by way of a case stated by the Special Commissioners of Income Tax ('the SCIT'), the taxpayer/appellant company ('the appellant') applied for an order requiring the SCIT to find further facts and to state a
F supplementary case to the High Court. This case was novel for the reasons that (i) by the time this application was heard, all the three SCIT had completed their terms of appointment; (ii) the SCIT did not include in the case stated certain evidence adduced by the appellant at the hearing of the appeal to the SCIT which had not been challenged ('the undisputed evidence') by the Director-General of Inland Revenue's ('the DGIR'); and
G (iii) by reason of para. 41 of Sch. 5 ('para. 41') to the Income Tax Act 1967 ('ITA'), whether a party could appeal to the Court of Appeal against any order of the High Court which does not involve a decision of the High Court on the questions of law referred to in the case stated. The appellant purchased a piece of land with a view to develop the land and hence, entered into a joint
H venture agreement ('the JVA') with Luxor Properties Sdn Bhd ('LPSB'). From 1999 to 2005, the appellant treated the consideration received from LPSB under the JVA as income which had been received by the appellant on the percentage of completion basis of the development project. Consequently, the appellant's income tax returns were submitted for the
I years of assessment ('YA') 1999 to 2005 on the JV percentage basis and these returns were accepted by the DGIR. In 2005, the appellant's tax agent reviewed the appellant's tax file and highlighted that the land had been sold outright on the date of the JVA. As such, the entire consideration received by the appellant from LPSB should have accrued in the basis year 1999.

Accordingly, on 27 January 2006, the appellant submitted a revised tax computation based on the outright sale basis (appellant's revised tax computation). With effect from 1 January 2000, the Malaysian income tax system was changed from the preceding year basis to the current year basis. As such, all income derived in the basis year 1999 was exempted from income tax. On 23 March 2010, the DGIR: (i) accepted that there was an outright sale of the land by way of the JVA; (ii) the last of the conditions precedent to the JVA had been satisfied on 28 May 2001 when there was approval of the development project and hence, the JVA became unconditional on 28 May 2001 and the appellant's income was deemed to have been derived or accrued in YA 2001; (iii) rejected the appellant's revised tax computation; and (iv) raised a notice of assessment of income tax with penalty for the year of assessment 2001 ('NA 2001'). The appellant appealed to the SCIT against NA 2001. The SCIT dismissed the appeal and affirmed the NA 2001 holding, *inter alia*, that the JVA was not an outright sale of the land by the appellant to LPSB and hence, this appeal. For the purpose of this appeal, a draft case stated ('draft case stated') had been prepared by the SCIT, for which, the appellant's solicitors provided lengthy comments which included, *inter alia*, the undisputed evidence. The appellant submitted that in view of the fact that all the three SCIT had completed their terms of appointment, for the purpose of a just disposal of this appeal, this court should order the production of the notes of evidence of the appeal to SCIT, including the undisputed evidence ('NOE'). The appellant further contended that the High Court has the power, under para. 39(c) of Sch. 5 to the ITA (para. 39(c)), to order the production of the NOE for the purpose of this appeal.

Held (ordering production of NOE for hearing of this appeal):

(1) The case stated, read as a whole, showed that it was full and fair, *ie*, the SCIT had broadly covered the area to be dealt with by the appellant's comments. Accordingly, this court was disinclined to exercise its discretion under para. 40(b) to require the SCIT to find further facts and to state a supplementary case. Further, all the three SCIT had completed their terms of employment and therefore, judicial discretion under para. 40(b) should not be exercised in vain. (paras 19 & 20)

(2) Section 102(4) read with para. 34 of Sch. 5 to the ITA clearly shows that the High Court can only hear an appeal on a question of law by way of case stated. Based on the undisputed evidence, there was a possibility that the SCIT could have: (i) made a finding of fact which no reasonable SCIT in the circumstances would have arrived at; (ii) took into account factors which the SCIT ought not to have; and/or (iii) reached a conclusion or drew an inference which were not supported by the evidence before the SCIT. (para 21)

(3) Although an order to produce NOE was not expressly prayed for, this court may order as such in the interest of justice. In view of the exceptional nature of this application, *ie*, the existence of the undisputed

A evidence, this court exercised its discretionary power under para. 39(c) to order the production of the NOE. The order to produce NOE did not prejudice the DGIR in any manner as the DGIR is entitled, if not duty bound, to dispute the NOE and to present any submission as the DGIR sees fit so as to resist this appeal successfully. The order to produce
B NOE was wholly exceptional and was *sui generis*. (paras 23-25)

(4) Section 102(4) of the ITA, paras. 23, 34 and 41, read together, showed that the parties may only appeal to the Court of Appeal against a decision of the High Court on questions of law referred to the High Court in the case stated as (i) the use of the mandatory term 'shall' in
C para. 41 evidences the intention of Parliament to confine appeals to Court of Appeal only in respect of the High Court's decisions regarding questions of law referred in the case stated; and (ii) the wording of para. 41 attracts the application of the maxim of construction, *expressio unius est exclusio alterius*, namely the express mention of one matter,
D implies the exclusion of matters which have not been explicitly mentioned. Applying the canon of interpretation, *expressio unius est exclusio alterius*, the express provision of the right of appeal to the Court of Appeal only in respect of the High Court's decisions regarding questions of law referred in the case stated, will necessarily mean that
E there is no right of appeal to the Court of Appeal against any decision or order of the High Court which do not concern questions of law referred to in the case stated. (para 28)

(5) Although s. 67(1) of the Courts of Judicature Act 1964 ('CJA') confers a right to appeal to the Court of Appeal against any 'judgment' or 'order'
F of the High Court, para. 41 should be preferred as s. 67(1) of the CJA has expressly provided that the right to appeal is subject to any other written law 'regulating the terms and conditions upon which such appeals shall be brought'. Further, para. 41 is a specific statutory provision whereas s. 67(1) of the CJA is a general statutory provision.
G The maxim of statutory construction, *generalia specialibus non derogant*, provides that a specific statutory provision should override a general statutory provision and accordingly, para. 41 should prevail over s. 67(1) of the CJA. Based on the interpretation, the order to produce NOE did not concern any decision by the High Court on questions of law referred to the High Court in the case stated. Accordingly, by reason
H of para. 41, there could not be any appeal to the Court of Appeal against the order to produce NOE. (paras 29-31)

Case(s) referred to:

Chua Lip Kong v. Director-General of Inland Revenue [1981] 1 LNS 157 PC ***(refd)***
Commissioners of Inland Revenue v. Fraser (1942) 24 TC 498 ***(refd)***
I *Consolidated Goldfields plc v. Inland Revenue Commissioners [1990] 2 All ER 398* ***(refd)***
Director-General of Inland Revenue v. Lahad Datu Timber Sdn Bhd [1977] 1 LNS 26 FC ***(refd)***
E v. Comptroller-General of Inland Revenue [1970] 1 LNS 25 FC ***(refd)***
Edwards v. Bairstow & Harrison [1956] AC 14 ***(refd)***

Infra Quest Sdn Bhd lwn. Ketua Pengarah Hasil Dalam Negeri [2015] 1 LNS 738 HC ***(refd)***
Insaf Tegas Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri, Kuala Lumpur (Civil Appeal No. W-01(IM)-328-10-2015) (Unreported) ***(refd)***
Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener) [2009] 4 CLJ 347 FC ***(refd)***
Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Lim Foo Yong Sdn Bhd v. The Comptroller-General of Inland Revenue [1986] 2 CLJ 182; [1986] CLJ (Rep) 1 PC ***(refd)***
Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 541 SC ***(refd)***
Mamor Sdn Bhd v. Director-General of Inland Revenue [1979] 1 LNS 145 ***(refd)***
MY v. Comptroller-General of Inland Revenue [1972] 1 LNS 80 FC ***(refd)***
North British & Mercantile Insurance Co v. Easson (Surveyor of Taxes) (1919) 7 TC 463 ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
PP v. Yap Min Woie [1995] 4 CLJ 692 FC ***(refd)***
Russell v. Commissioners of Inland Revenue (1944) 26 TC 242 ***(refd)***
Sincere Leasing Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2000] 4 CLJ 334 CA ***(refd)***
Supportive Technology Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2014] 1 LNS 811 HC ***(refd)***
UHG v. Director-General of Inland Revenue [1974] 1 LNS 181 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 67(1)
Income Tax Act 1967, s. 102(4), Sch. 5 paras. 23, 34, 37(a), 39(c), 40(b), 41
Juvenile Courts Act 1947, ss. 12(1), 28

For the appellant - DP Naban & Jason Tan Jia Xin; M/s Lee Hishammuddin Allen & Gledhill
For the respondent - Duna Mohd Isa, SFC & Kevin Hal Lai Keong, FC; Inland Revenue Board

Reported by S Barathi

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] In this appeal to the High Court (this appeal) by way of a case stated (case stated) by the Special Commissioners of Income Tax (SCIT), the taxpayer/appellant company (appellant) applied in court enclosure no. 2 (this application) for an order requiring the SCIT to find further facts and to state a supplementary case to the High Court.

[2] This case is novel for three reasons. Firstly, by the time this application is heard, all the three SCIT have completed their terms of appointment. Secondly, the SCIT did not include in the case stated, certain evidence adduced by the appellant at the hearing of the appeal to the SCIT

(appeal to SCIT) which had not been challenged (undisputed evidence) by the Director General of Inland Revenue's (DGIR). Lastly, by reason of para. 41 of Sch. 5 (para. 41) to the Income Tax Act 1967 (ITA), can a party appeal to the Court of Appeal against any order of the High Court which does not involve a decision of the High Court on the questions of law referred to in the case stated?

Background

[3] The appellant purchased a piece of land (land) with a view to develop the land.

[4] On 2 February 1999, the appellant entered into a joint venture agreement (JVA) with Luxor Properties Sdn Bhd (LPSB). The JVA provided for, among others, the following:

(a) the appellant sold all its rights and interest in the land to LPSB;

(b) LPSB had the right to develop the land (development project) and make the necessary applications in relation to the development project; and

(c) the appellant was entitled to 20% of the aggregate sale price of the first phase of the development project and 22.5% of the aggregate sale price of each subsequent phase of the development project.

[5] From 1999 to 2005, the appellant treated the consideration received from LPSB under the JVA as income which had been received by the appellant on the percentage of completion basis of the development project (JV percentage basis). Consequently, the appellant's income tax returns were submitted for the years of assessment (YA) 1999 to 2005 on the JV percentage basis and these returns were accepted by the DGIR.

[6] In 2005, the appellant's tax agent reviewed the appellant's tax file and highlighted that the land had been sold outright on 2 February 1999, the date of the JVA (outright sale basis). As such, the entire consideration received by the appellant from LPSB should have accrued in the basis year 1999. Accordingly, on 27 January 2006, the appellant submitted a revised tax computation based on the outright sale basis (appellant's revised tax computation). With effect from 1 January 2000, the Malaysian income tax system was changed from the preceding year basis to the current year basis. As such, all income derived in the basis year 1999 was exempted from income tax.

[7] On 23 March 2010, the DGIR:

(a) accepted that there was an outright sale of the land by way of the JVA;

(b) the last of the conditions precedent to the JVA had been satisfied on 28 May 2001 when there was approval of the development project. Hence, the JVA became unconditional on 28 May 2001 and the appellant's income was deemed to have been derived or accrued in YA 2001;

(c) rejected the appellant's revised tax computation; and

(d) raised a notice of assessment of income tax with penalty for the year of assessment 2001 (NA 2001).

[8] Appeal to SCIT had been filed by the appellant against NA 2001.

Appeal To SCIT

[9] In the appeal to SCIT:

(a) the appellant called two witnesses while one witness testified for the DGIR;

(b) all these witnesses had been cross-examined by learned counsel from the opposing party;

(c) documentary evidence had been tendered; and

(d) both the appellant and DGIR had presented written submissions.

[10] The undisputed evidence showed that there was an outright sale of the land by the appellant to LPSB. Despite the undisputed evidence, the SCIT found as "proved facts", among others, as follows:

(a) the amount of RM28,343,220 had not been stated specifically in the JVA as the consideration for the land which had been sold by the appellant to LPSB;

(b) the appellant had given a power of attorney to LPSB to develop the land. The title to the land was never transferred to LPSB and the appellant was tasked with the responsibility of effecting the transfers of titles to future end purchasers;

(c) the appellant had always been submitting its accounts and income tax returns based on the JV percentage basis and this had been accepted by the DGIR. The appellant had never declared or reported any income from the alleged outright sale of the land *via* the JVA in its annual accounts ended 30 June 1999, 2000, 2001, 2002, 2003, 2004 or 2005 for its tax computation prior to 27 January 2006; and

(d) on 23 March 2010, the DGIR accepted the appellant's contention that the JVA was an outright sale of the land and raised the NA 2001. The DGIR imposed a penalty on the appellant for its neglect in not reporting the disposal of the land within the statutory period of six years which was computed as commencing from 1999 and ending in 2005.

[11] The SCIT decided, among others, as follows:

(a) the JVA was a joint venture between the appellant and LPSB. The JVA was not an outright sale of the land by the appellant to LPSB;

(b) the appellant had acted negligently and/or had committed wilful default. As such, the DGIR was entitled to raise NA 2001 and impose a penalty outside the prescribed period; and

(c) the appeal to SCIT was dismissed and the NA 2001 had been affirmed.

[12] The appeal to SCIT was subsequently dismissed and hence, this appeal.

[13] For the purpose of this appeal, a draft case stated (draft case stated) had been prepared by the SCIT. The SCIT then forwarded the draft case stated to the appellant's solicitors and DGIR for their comments. The appellant's solicitors had provided lengthy comments (by way of a ten page letter) on the draft case stated (appellant's comments). The appellant's comments included, among others, the undisputed evidence. The SCIT did not however incorporate any of the appellant's comments, let alone the undisputed evidence, in the case stated.

Submission Of Parties

[14] The appellant's learned counsel submitted that in view of the fact that all the three SCIT had completed their terms of appointment, for the purpose of a just disposal of this appeal, this court should order the production of the notes of evidence of the appeal to SCIT, including the undisputed evidence (NOE), in this appeal. According to the appellant's learned counsel, the High Court has the power under para. 39(c) of Sch. 5 to the ITA (para. 39(c)) to order the production of the NOE for the purpose of this appeal.

[15] The learned Senior Revenue Counsel vigorously opposed this application on the following grounds:

(i) the SCIT are the sole judges of fact in an appeal to SCIT. As such, neither the High Court nor the appellant could "dictate" what additional facts were to be included by the SCIT in the case stated;

(ii) the SCIT were under no obligation under the ITA to accept and include any of the appellant's comments in the case stated. Nor were the SCIT bound by any provision in the ITA to give reasons for not including any of the appellant's comments in the case stated;

(iii) unlike an appeal, a case stated is only an appeal on a point of law. Hence, there is no need to adduce the NOE for the purpose of this appeal; and

(iv) the following cases had been relied on by the DGIR to resist this application (in the order the cases were presented in three written submissions of the DGIR):

(a) the Privy Council's decision delivered by Lord Diplock on an appeal from Malaysia, *Chua Lip Kong v. Director-General of Inland Revenue* [1981] 1 LNS 157; [1982] 1 MLJ 235;

(b) the Supreme Court's judgment delivered by Edgar Joseph Jr SCJ in *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 541; [1994] 2 MLJ 713;

(c) Scott J's (as he then was) decision in the English High Court case of *Consolidated Goldfields plc v. Inland Revenue Commissioners* [1990] 2 All ER 398;

(d) the Court of Appeal's judgment given by Siti Norma Yaakob JCA (as she then was) in *Sincere Leasing Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2000] 4 CLJ 334; [2000] 2 AMR 2050;

(e) Gill FJ's (as he then was) decision in the Federal Court case of *E v. Comptroller-General of Inland Revenue* [1970] 1 LNS 25; [1970] 2 MLJ 117 (*E*'s case);

(f) the unreported judgment of Zaleha Yusof J (as she then was) in the High Court case of *Supportive Technology Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2014] 1 LNS 811, Kuala Lumpur High Court Judicial Review No. R2-14-3-02/2013;

(g) the decision of Lee Hun Hoe CJ (Borneo) in the Federal Court in *Director-General of Inland Revenue v. Lahad Datu Timber Sdn Bhd* [1977] 1 LNS 26; [1978] 1 MLJ 203;

(h) the unreported judgment of Ahmad Bache JC in the High Court in *Infra Quest Sdn Bhd lwn. Ketua Pengarah Hasil Dalam Negeri* [2015] 1 LNS 738, Kota Bharu High Court Civil Appeal No. 16-NCVC-2-01-2014. This High Court's judgment has been affirmed by the Court of Appeal in Civil Appeal No. D-01(IM)(NCVC)-225-07-2015;

(i) the decision of Raja Azlan Shah FJ (as His Majesty then was) in the Federal Court case of *UHG v. Director-General of Inland Revenue* [1974] 1 LNS 181; [1974] 2 MLJ 33;

(j) Lord Skerrington's judgment in the Scottish Court of Session in the *North British & Mercantile Insurance Co v. Easson (Surveyor of Taxes)* (1919) 7 TC 463;

(k) the English Court of Appeal case of *Russell v. Commissioners of Inland Revenue* (1944) 26 TC 242; and

(l) the High Court's judgment of Asmabi bt Mohamad J (as she then was) in *Insaf Tegas Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri*, Kuala Lumpur High Court Civil Appeal No. W-01(IM)-328-10-2015 (Unreported).

Relevant Provisions In ITA

[16] The following provisions in the ITA are relevant to this application:

> 102(1) Subject to subsection (3), the [DGIR] may send an appeal forward to the [SCIT] at any time within the twelve-month period from the date of receipt of the notice of appeal or, if an extension under

section 101(1B) has been granted, within the extended period if he is of the opinion that there is no reasonable prospect of coming to an agreement with the appellant in accordance with section 101(2) in respect of the appeal and if section 101 (3) and (4) are not applicable; and, where he sends an appeal forward under this subsection, he shall give the appellant written notice that he has done so.

(2) [Deleted]

(3) No appeal shall be sent forward to the [SCIT] if the [DGIR] and the appellant have or are deemed to have come to an agreement in respect of it in accordance with section 101(2), (3) or (4).

(4) *Where an appeal is sent forward to the [SCIT] pursuant to this section, the appeal shall be sent forward in the manner provided by Schedule 5 and that Schedule shall have effect for regulating the hearing and determination of the appeal and otherwise as provided therein.*

(5) Where an appeal has been sent forward to the [SCIT] pursuant to this section:

(a) the [DGIR] and the appellant at any time before the hearing of the appeal by the [SCIT] is completed may come to an agreement of the kind mentioned in section 101(2) with regard to the assessment to which the appeal relates; or

(b) the appellant may at any time withdraw the appeal.

(6) Where the [DGIR] and the appellant come to an agreement under subsection (5) (a), the [DGIR] shall and the appellant may, send a true copy of the agreement to the [SCIT].

(7) Where the [SCIT] are satisfied that the [DGIR] and the appellant have come to an agreement under subsection (5)(a) with regard to the assessment to which an appeal relates:

(a) the proceedings before the [SCIT] relating to the appeal shall abate;

(b) the agreement shall have effect as if it had been come to under section 101(2); and

(c) section 101(8) and (9) shall apply accordingly.

(8) Where the [SCIT] are satisfied that the appellant has withdrawn his appeal under subsection (5)(b):

(a) the proceedings before the [SCIT] relating to the appeal shall abate; and

(b) the assessment to which the appeal relates shall be final and conclusive for the purposes of this Act, the Income Tax Ordinance 1956, of Sabah, the Inland Revenue Ordinance 1960, of Sarawak or the Income Tax Ordinance 1947, of West Malaysia, as the case may be.

(9) In this section "appeal" means an appeal against an assessment.

Schedule 5 (Section 102)

Further appeals

34 *Either party to proceedings before the [SCIT] may appeal on a question of law against a deciding order made in those proceedings* (including a deciding order made pursuant to paragraph 26(b) or (c)) *by requiring the [SCIT] to state a case for the opinion of the High Court* and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal.

37 *A case stated under paragraph 34:*

(a) *shall set forth the facts as found by the [SCIT], the deciding order and the grounds of their decision*; and

(b) shall be signed by the [SCIT] who heard the appeal (or, if any of them are incapacitated from signing by reason of death, illness, absence or any other cause, by such of them as are able to do so.)

39 *The High Court shall hear and determine any question of law arising on a case stated under paragraph 34 and may in accordance with its determination thereof:*

(a) order the assessment to which the case relates to be confirmed, discharged or amended;

(b) remit the case to the [SCIT] with the opinion of the court thereon; or

(c) *make such other order as it thinks just and appropriate.*

40 *At any time before it determines the questions of law arising on a case stated under paragraph 34, the High Court may:*

(a) cause the case to be sent back to the [SCIT] for amendment; or

(b) *require the [SCIT] to find further facts and state a supplementary case,*

and may postpone or adjourn the proceedings before it until the amendment has been made or the requisition complied with.

41 *There shall be such rights of appeal from decisions of the High Court on cases stated under paragraph 34 as exist in respect of decisions of the High Court on questions of law in its appellate civil jurisdiction.*

(emphasis added)

Court Cannot Require SCIT To Find Further Facts And To State Supplementary Case

[17] In an appeal to SCIT:

(i) the SCIT are the sole deciders of fact in an appeal to SCIT - *Chua Lip Kong*, at p. 236; and

(ii) para. 37(a) of Sch. 5 to the ITA only requires the SCIT to set forth the facts found by the SCIT and the SCIT need not submit the NOE:

(a) *E*'s case, at p. 119; and

(b) *UHG*, at p. 33.

[18] The following cases have explained the court's discretionary power under para. 40(b) of Sch. 5 to the ITA (para. 40(b)) to require SCIT to find further facts and to state supplementary case:

(i) in *Sincere Leasing*, at p. 341 (CLJ); p. 2060 (MLJ), the Court of Appeal has followed the English High Court's decision in *Consolidated Goldfields*:

> Under paragraph 6 of the case stated, the Special Commissioners had, at sub-paragraph (a) set out all the facts admitted and at sub-paragraph (b) all the facts proved. *But there is no specific finding of fact as to the accounting method used by the appellant nor the one used in the leasing industry, although they had in passing made references to them. But reference alone is not sufficient. There must be primary findings of fact made in the accounting systems adopted by the appellant and the one currently in use in the industry. Findings of fact are very important in a case stated as the notes of evidence taken by the Special Commissioners are never submitted to the High Court. It is for this reason that there is a need to make a finding on the matter of the accounting systems relied upon by the appellant and currently in use in the leasing industry and to clearly state so, to enable the High Court to ascertain the real question of law sought to be raised. Guidelines on this matter were enunciated in the case of Consolidated Goldfields plc v. Inland Revenue Commissioners* [1990] STC 357 where at p 361 it was held as follows:
>
> (1) *The findings of fact are for the commissioners. They cannot be instructed to find facts, nor as to the manner in which they express their findings.*
>
> (2) *The parties are entitled to expect that the commissioners will in the case stated make findings covering the matters which are relevant to the arguments adduced or intended to be adduced on appeal.*
>
> (3) *If a request is made for a case stated to be remitted for additional findings to be made or to be considered, the applicant must, in my opinion, show that the desired findings are,*
>
> (a) *material to some tenable argument,*
>
> (b) *at least reasonably open on the evidence that has been adduced, and*
>
> (c) *not inconsistent with the finding or findings that have already been made.*
>
> (emphasis added); and

(ii) besides the above part of the judgment in *Consolidated Goldfields* which had been adopted in *Sincere Leasing*, the English High Court further held as follows in *Consolidated Goldfields*, at p. 402:

> I would add this. In my opinion *the commissioners must be protected from nit-picking. If the case stated is full and fair, in that its findings broadly cover the territory desired to be dealt with by the proposed additional findings, the court should I think be slow to send the case back, particularly so if it appears that the Special Commissioners have had the proposed findings in mind when settling the final form of the case stated.*
>
> (emphasis added)

[19] On an objective reading of the case stated as a whole, I am of the view that the case stated is full and fair as explained in *Consolidated Goldfields*, namely the SCIT have broadly covered the area to be dealt with by the appellant's comments. Accordingly, on this ground alone, this court is disinclined to exercise its discretion under para. 40(b) to require the SCIT to find further facts and to state a supplementary case.

[20] There is another reason to refuse this application, namely all the three SCIT have completed their terms of employment. Judicial discretion under para. 40(b) should not be exercised in vain.

Should Court Order Production Of NOE In This Appeal?

[21] It is clear that under s. 102(4) read with para. 34 of Sch. 5 to the ITA (para. 34), the High Court can only hear an appeal on a question of law by way of case stated. Having said that, the following cases illustrate the circumstances wherein the court may intervene in respect of the SCIT's findings of fact or inferences drawn by SCIT from findings of facts:

(i) when the SCIT have made a finding of fact which is perverse or which is not supported by any evidence. I rely on the following cases:

(a) in *Lower Perak Co-operative Housing Society Bhd*, at pp. 552-553 (CLJ); p. 732 and 733 (MLJ), the Supreme Court affirmed the judgments of Lord Radcliffe in *Edwards v. Bairstow & Harrison* [1956] AC 14 and Lord President Normand in *Commissioners of Inland Revenue v. Fraser* (1942) 24 TC 498 as follows:

> *The duty of the court when hearing appeals from the special commissioners*
>
> *First of all, it would be pertinent to say that in considering this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in Edwards v. Bairstow and Harrison, regarding the duty of the court when hearing appeals from commissioners in tax cases.* It will be recalled that in that case what Lord Radcliffe said (at pp 35-36) was this:
>
> > I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences

A drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. B If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, *it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come* C *to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters* D *whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my* E *part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.*

F In *Commissioners of Inland Revenue v. Fraser*, Lord President Normand said this (at p 501):

Then the commissioners, on consideration of the facts and arguments submitted to them, decided by a majority that an adventure in the nature of trade had G not been carried on; that an investment had been made and subsequently realised, and that the profit was not assessable to income tax. It is obvious from the way in which the commissioners have stated their conclusion that they were quite aware that they were not stating something in the nature of a primary fact H but were stating a conclusion into which argument upon the construction of the Income Tax Act had entered. The respondent's counsel maintained, however, that that finding was a finding in fact and, as such, was not reviewable by this court. I think we have jurisdiction to entertain the question at law, I which is whether the majority of the commissioners were warranted on the evidence in determining as they did. *At the narrowest it is always open to this court in*

a stated case to review a finding in fact on the ground that there is no evidence to support it. That has been stated again and again.

(emphasis added); and

(b) Anuar J (as he then was) decided as follows in the High Court case of *Mamor Sdn Bhd v. Director-General of Inland Revenue* [1979] 1 LNS 145; [1981] 1 MLJ 117, at 118:

It has been argued that the deciding order of the Special Commissioners is entirely based on findings of facts and as such the court cannot interfere with the decision made on such findings by the Special Commissioners. With respect I am of the opinion that it is open for the High Court to review the decision of the Special Commissioners, if the Special Commissioners:

1. misdirect themselves on the law; or
2. answer the wrong question; or
3. omit to answer a question which they ought to have answered; or
4. **took into account factors which they ought not to have**; or
5. **reached a conclusion on facts which is not supported by the evidence before them**; or
6. **made a finding of facts which no reasonable person in the circumstances would have arrived at**.

(emphasis added);

(ii) when the SCIT take into account irrelevant factors - *Mamor Sdn Bhd*, at p. 118; and

(iii) when the SCIT draw an inference or reach a conclusion which is not supported or which is contrary to evidence. This is clear from the following appellate cases:

(a) in *Lim Foo Yong Sdn Bhd v. The Comptroller-General of Inland Revenue* [1986] 2 CLJ 182; [1986] CLJ (Rep) 1 at p. 11; [1986] 2 MLJ 161, at p. 169, Lord Oliver delivered the following opinion of the Privy Council in an appeal from Malaysia:

Broadly the judgment of the Federal Court simply follows and adopts the reasoning of the Special Commissioners. **The Court rightly said that it could not exercise an original jurisdiction on matters of fact.**

…

Their Lordships have felt unable to agree with this, having regard to the reasoning upon which the decision of the Special Commissioners was based and to the inconsistencies in their findings. There was, in their Lordships' view, no evidence of probative value upon which the

A *Commissioners could legitimately conclude that the transactions giving rise to the additional assessments were other than the realisation of capital assets. ...*

...

B *The Special Commissioners are, of course, as the Federal Court rightly observed, the judges of fact, but in finding the facts and drawing inferences of secondary fact from them, they must not misdirect themselves and they must draw conclusions from facts having probative value. In their Lordships' judgment, the Special Commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions.*

C (emphasis added); and

(b) in *MY v. Comptroller-General of Inland Revenue* [1972] 1 LNS 80; [1972] 2 MLJ 110, at 114, Gill FJ (as he then was) held as follows in the Federal Court:

D *In dealing with the case stated, the learned judge in the court below, from whose decision this appeal has been brought, took the view that as the special commissioners who had all the relevant material facts before them reviewed the facts as a whole before arriving at their conclusion, it was not open to him to review such conclusion, and he accordingly dismissed the appeal. I regret to say, with respect, that I find myself unable to agree with him. As I have already pointed out, the special commissioners misdirected themselves as to the meaning of the word "resident".* They thought that residence means permanent home, thus confusing residence with domicile. They regarded the appellant's residence in India as exclusive of residence in Malaya. There is nothing in their grounds of decision to indicate that they were aware that a man can have two residences. They never directed their minds to the question as to whether Malaya was a second residence of the appellant, his residence in India being inconclusive as to this question. They also misdirected themselves as to the meaning of "temporary" in that they appear to have thought that it meant short. *On the whole, their conclusion could not properly be drawn from the evidence before them. In those circumstances, it was open to the learned judge, as it is open to this court, to review the decision of the special commissioners* (see *Lysaght v. The Commissioners of Inland Revenue*, per Viscount Sumner 13 TC 511 at page 527 [1928] AC 234 HL).

(emphasis added)

[22] At this juncture, I should not decide on the merits of this appeal. Nonetheless, based on the undisputed evidence, there was a possibility that the SCIT could have:

(a) made a finding of fact which no reasonable SCIT in the circumstances would have arrived at;

(b) took into account factors which the SCIT ought not to have; and/or

(c) reached a conclusion or drew an inference which were not supported by the evidence before the SCIT.

[23] In view of the exceptional nature of this application, namely the existence of the undisputed evidence, this court exercises its discretionary power under para. 39(c) to order the production of the NOE which may be considered by this court in deciding this appeal (order to produce NOE).

[24] The order to produce NOE does not prejudice the DGIR in any manner as the DGIR is entitled, if not duty bound, to dispute the NOE and to present any submission as the DGIR sees fit so as to resist successfully this appeal. It should be emphasised that the order to produce NOE in this case is wholly exceptional and is *sui generis*.

[25] This application did not expressly pray for an order to produce NOE but this court may order as such in the interest of justice pursuant to the second prayer of this application (whereby the appellant prayed for all further or other directions which this court deems fit and proper). I refer to Salleh Abas FJ's (as he then was) judgment in the Federal Court case of *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190, at 198, as follows:

> From these two paragraphs of the statement of claim it is obvious that the respondent's solicitors treated the claim for loss of earnings as falling into two categories - (a) pre-trial loss, which they described it as "loss of earnings" and (b) future loss of earnings, which they referred to as "prospective loss of earnings". But instead of pleading the pre-trial loss of earnings or "loss of earnings" as they described it as an item under special damages, they erroneously pleaded it as an item under general damages. This is purely a technical mistake, which in our view did not in any way affect the substance or prejudice the appellant - see O. 2 (Effect of Non-Compliance) of the Rules of the High Court 1980. *We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors, who were not up-to-date with this aspect of legal technicalities. In any case prayer (e) in para. (7), "Any other relief which this Honourable Court deem fit to grant" must not be treated as a mere ornament to pleadings devoid of any meaning. We think that this prayer and the prayer for "loss of earning" in para. 5(a) should entitle the Court to make such an assessment.*
>
> (emphasis added)

[26] All the cases cited by the learned Senior Revenue Counsel can be distinguished from this matter on the ground that there exists the undisputed evidence in this case. Furthermore, this case concerns the exercise of court's discretion under para. 39(c).

Order To Produce NOE Is Not Appealable To Court Of Appeal

[27] Section 102(4) of the ITA has expressly provided that Sch. 5 to ITA "shall" have effect regarding any appeal to SCIT. Paragraph 23 of Sch. 5 to ITA (para. 23) states the SCIT's "deciding order" "shall be final". Paragraph

34 however provides that parties may only appeal on a question of law against the SCIT's "deciding order". Paragraph 41 has explicitly stated that there "shall" only be a right of appeal against the High Court's "decisions" "on questions of law" in the exercise of the High Court's appellate jurisdiction.

[28] Reading together s. 102(4) of the ITA, paras. 23, 34 and 41, I am of the respectful view that parties may only appeal to the Court of Appeal against a decision of the High Court on questions of law referred to the High Court in the case stated. This view is premised on the following reasons:

(i) the use of the mandatory term "shall" in para. 41 evidences the intention of Parliament to confine appeals to Court of Appeal only in respect of the High Court's decisions regarding questions of law referred in the case stated. In *Public Prosecutor v. Yap Min Woie* [1995] 4 CLJ 692; [1996] 1 MLJ 169, at pp. 172-173, the Federal Court in a judgment given by Mohd Dzaiddin FCJ (as he then was), gave effect to the mandatory term "shall" in ss. 12(1) and 28 of the then applicable Juvenile Courts Act 1947; and

(ii) the wording of para. 41 attracts the application of the maxim of construction, *expressio unius est exclusio alterius*, namely the express mention of one matter, implies the exclusion of matters which have not been explicitly mentioned. An application of this maxim is demonstrated in the Federal Court's judgment delivered by Nik Hashim FCJ in *Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] 4 CLJ 347; [2009] 4 MLJ 593, at 605-606. Applying the canon of interpretation, *expressio unius est exclusio alterius*, the express provision of the right of appeal to the Court of Appeal only in respect of the High Court's decisions regarding questions of law referred in the case stated, will necessarily mean that there is no right of appeal to the Court of Appeal against any decision or order of the High Court which do not concern questions of law referred in the case stated.

[29] I have not overlooked s. 67(1) of the Courts of Judicature Act 1964 (CJA) which confers a right to appeal to the Court of Appeal against any "judgment" or "order" of the High Court. Section 67 of the CJA provides as follows:

> **Appellate Jurisdiction - Civil Appeals**
>
> **67 Jurisdiction to hear and determine civil appeals.**
>
> (1) **The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter**, whether made in the exercise of its original or of its appellate jurisdiction, **subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought**.

(2) The Court of Appeal shall have all the powers conferred by section 24A on the High Court under the provisions relating to references under order of the High Court.

(emphasis added)

[30] I am of the respectful opinion that para. 41 should be preferred to s. 67(1) of the CJA for the following reasons:

(i) section 67(1) of the CJA itself has expressly provided that the right to appeal as provided in that provision is subject to any other written law "regulating the terms and conditions upon which such appeals shall be brought". It is therefore clear that the explicit wording of s. 67(1) of the CJA itself allows s. 67(1) of the CJA to be subject to para. 41; and

(ii) paragraph 41 is a specific statutory provision whereas s. 67(1) of the CJA is a general statutory provision. The maxim of statutory construction, *generalia specialibus non derogant*, provides that a specific statutory provision should override a general statutory provision. This canon of statutory interpretation, *generalia specialibus non derogant*, has been applied by the Federal Court in a judgment delivered by Raja Azlan Shah CJ (Malaya) (as his Majesty then was) in *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119, at 119. In accordance with this maxim of statutory construction, para. 41 should prevail over s. 67(1) of the CJA.

[31] If the above interpretation of para. 41 is accepted, the order to produce NOE does not concern any decision by the High Court on questions of law referred to the High Court in the case stated. Accordingly, by reason of para. 41, there cannot be any appeal to the Court of Appeal against the order to produce NOE.

[32] The above construction of para. 41 does not prejudice the DGIR in any manner. After the disposal of this appeal regarding the questions of law referred to the High Court in the case stated, there will be a right to appeal to the Court of Appeal (appeal to Court of Appeal) according to para. 41. Assuming this appeal is resolved in the appellant's favour, the DGIR has the right under para. 41 to file an appeal to the Court of Appeal. Consequently, the DGIR is able to challenge the validity of the order to produce NOE in the appeal to Court of Appeal.

Court Order

[33] In view of the above reasons, this court orders the production of the NOE for the hearing of this appeal.